As far as such employment of the township clerk as caretaker of the township cemetery is concerned, I believe that it is within the authority of the township trustees to so hire. I believe further that the duties of the caretaker of a township cemetery are not such official duties as are contemplated by the general law of Ohio that more than one offce can be held by one individual if the offices are compatible, and no more than one office can be held by one individual if the offices are incompatible.

It has been held in the Opinions of the Attorney General for 1918, Volume 1, Page 683, that a township clerk could also be employed as a janitor of public buildings. If this be true, certainly a township clerk could be employed as craetaker for a township cemetery.

The second branch of the syllabus of the opinion of the former Attorney General above referred to reads as follows:

> "The limitation of Section 3308, General Code, upon maximum annual compensation of the township clerk does not apply to services outside the scope of his official duties."

It is therefore my opinion, in specific answer to your inquiry, that the township clerk may be employed as caretaker or sexton of a township cemetery upon a contract from month to month or for one year, such compensation to be paid to the caretaker in addition to the amount fixed for his services as township clerk.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

715.

SECTIONS 6064-1, 6064-15, 6064-41, 6064-42, GENERAL CODE ARE LAWS PROVIDING TAX LEVIES—ARTICLE II, SECTION 1d, OHIO CONSTITUTION—PERMITS REMAIN IN FORCE, WHEN—LIQUOR PERMITS, FEES, RIGHTS, ETC.

SYLLABUS:

1. *Sections* 6064-1, 6064-15, 6064-41 *and* 6064-42, *General Code, as contained in Amended House Bill* 501 *of the* 92*nd General Assembly are "laws providing for tax levies" within the meaning of the term as used in Article II, Section* 1*d of the Constitution, and became effective May* 20, 1937, *when such act was signed by the Governor.*

2. *Permits issued under authority of the Ohio Liquor Control Act which have not expired before the effective date of Amended House Bill No.* 501 *will remain in force until their expiration dates.*

3. *Liquor permits are governed as to fees and rights by the law under authority of which they were issued.*

COLUMBUS, OHIO, June 11, 1937.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: I have your recent request for my opinion as follows:

> "(a) Did Sections 6064-1 and 6064-15 of the General Code of the State of Ohio as amended by House Bill No. 501 go into immediate effect when signed by the Governor, May 20th, 1937?
>
> (b) Shall the initial fees for A-1 and B-1 permits issued prior to the effective date of Section 6064-15, amended by House Bill No. 501 continue to be increased in accordance with the quantity of beer or malt liquor manufactured or distributed subsequent to the effective date of Section 6064-15 as amended by House Bill No. 501?"

There are two provisions in the Constitution of Ohio dealing with the effective date of statutes, namely, Sections 1c and 1d of Article II, and the pertinent parts of those provide as follows:

Section 1c:

> "* * * no law passed by the general assembly shall go into effect until 90 days after it shall have been filed by the Governor in the office of the Secretary of State except as herein provided. * * *"

Section 1d:

> "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to the referendum."

Therefore, your first question depends upon a determination of whether those parts of Amended House Bill No. 501 mentioned in your letter fall within one of the exceptions specified in Section 1d of Article

II of the Constitution. It is quite evident that the only possibility is the provision as to "laws providing for tax levies" as there is no emergency clause and no appropriation for current operating expenses.

An examination of the Act reveals that the amendment to Section 6064-1, General Code, contains various definitions to be used in interpreting and construing the Liquor Control Act (Sections 6064-1, et seq., General Code). Section 6064-15, General Code, as amended in Amended House Bill No. 501 provides for the various types of permits that may be issued under the Ohio Liquor Control Act and the fees and rights which are to attach to each class of permit. It should be noted that Amended House Bill No. 501 also amended Sections 6064-41 and 6064-42 of the General Code, and that these latter two sections specifically provide for the levying of a tax on various products having the specified alcoholic content. Inasmuch as Section 6064-1, General Code, contains definitions of terms, which definitions are to be used in the construction and interpretation of Sections 6064-41 and 6064-42, General Code, Section 6064-1 must be considered as a part of the tax levying provisions and therefore, in my opinion, this section was effective immediately after signature by the Governor. See Opinions of the Attorney General for 1935, Vol. I, page 705.

The other section amended in House Bill No. 501 mentioned in your letter, namely Section 6064-15, General Code, presents a much more difficult problem. In the above cited oipion by my predecessor in office, a previous amendment to Section 6064-15, was considered and therein it was decided that the section as amended in Amended Senate Bill No. 2 of the 91st General Assembly went into effect immediately upon signature by the Governor. However, it should be noted that that opinion did not in any way consider the problem of whether or not Section 6064-15, General Code, levied taxes, but because the then amended section contained a definition which was necessary for the interpretation of Sections 6064-41, 6064-41a and 6212-48, General Code, it was concluded that the section amending Section 6064-15 in that bill was part of the aforesaid tax levying sections, namely Sections 6064-41, 6064-41a and 6212-48, General Code.

The salient portions of Section 6064-15, General Code, as amended, pertinent to a determination of whether or not this section is a law "providing for tax levies" as the term is used in Article II, Section 1d of the Constitution and therefore in immediate effect upon being signed by the Governor, are as follows:

> "The following classes of permits may be issued:
>
> Permit A-1: A permit to a manufacturer to manufacture beer, ale, stout, and other malt liquor containing not more than

seven percentum of alcohol by weight and sell such products in bottles or containers for home use and to retail and wholesale permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be one thousand dollars for each plant during the year covered by the permit.

Permit A-2: A permit to a manufacturer to manufacture wine, to import and purchase wine * * *. The fee for this permit shall be twenty dollars for each plant producing one hundred wine barrels, of fifty gallons each, or less annually; and said initial fee shall be increased at the rate of ten cents per such barrel for all wine manufactured in excess of one hundred barrels during the year covered by the permit.

Permit A-3: A permit to a manufacturer to manufacture alcohol and spirituous liquor and sell such product to the department of liquor control or to the holders of a like permit or to the holders of A-4 permits for blending or manufacturing purposes; and to import alcohol into this state * * *.

The fee for this permit shall be one thousand dollars for each plant; but in case of a plant whose production capacity is less than five hundred wine barrels of fifty gallons each, annually, the fee shall be at the rate of two dollars per barrel.

Permit A-4: A permit to a manufacturer to manufacture prepared highballs, cocktails, cordials and other mixed drinks containing not less than seven per centum of alcohol by weight and not more than twenty-one per centum of alcohol by volume, and sell such product * * *.

* * * The fee for this permit shall be one thousand dollars for each plant.

Permit B-1: A permit to a wholesale distributor of beer * * *. The fee for this permit shall be one thousand dollars for each distributing plant or warehouse during the year covered by the permit.

Permit B-2: A permit to a wholesale distributor of wine * * *. The fee for this permit shall be one hundred dollars for each distributing plant or warehouse and said initial fee shall be increased at the rate of ten cents per wine barrel of fifty gallons for all wine distributed and sold in Ohio in excess of twelve hundred and fifty such barrels during the year covered by the permit.

Permit B-3: A permit to a wholesale distributor of wine to bottle, distribute or sell sacramental wine for religious rites upon applications signed, dated and approved in the manner

required for the purchase of wine for such purposes under section 6064-22a of the General Code. The fee for this permit shall be twenty-five dollars.

Permit B-4: A permit to a wholesale distributor to purchase from the holders of A-4 permits and to import and distribute and sell prepared and bottled highballs, cocktails, cordials and other mixed beverages * * *. The fee for this permit shall be computed on the basis of annual sales and the initial fee shall be one hundred dollars for each distributing plant or warehouse, and said initial fee shall be increased at the rate of ten cents per wine barrel of fifty gallons for all such beverages distributed and sold in Ohio in excess of one thousand such barrels during the year covered by the permit.

Permit B-5: A permit to a wholesale distributor of wine to purchase from the holders of A-2 permits to import in containers of not more than sixty gallons each and bottle wine for distribution * * *. The fee for this permit shall be five hundred dollars.

Permit C-1: A permit to the owner or operator of a retail store to sell beer in containers and not for consumption on the premises * * *. The fee for this permit shall be fifty dollars for each location.

* * * * * * * * *

There are twelve additional types of permits provided by this section, fees for which vary in amount down to as little as five dollars.

Deligient research discloses no judicial determination in Ohio of what constitutes "tax levies" within the meaning of the term as used in Article II, Section 1d of the Constitution, exempting such acts from the provisions of the Constitution reserving to the people the right of referendum, nor do I find the term "tax, taxation or tax levies" judicially construed in any other jurisdiction as applicable to a question of this nature.

That Section 6064-15, supra, is a licensing section is apparent and it is also apparent that it was enacted in part at least for the purpose of regulating and controlling the liquor traffic. It is also apparent that the fees provided are such as to produce substantial revenue for the state. I am informed that fees collected during the year 1936 under the provisions of this section of the General Code and distributed under the law to the local subdivisions to be credited to their general funds aggregated about $4,800,000 in amount. I am accordingly confronted with the question of whether or not a statute passed for the obvious purpose of producing a substantial amount of revenue for the main-

tenance and operation of government, as well as for the purpose of controlling and regulating the liquor traffic, is a law providing for tax levies within the meaning of the term as used in the section of the Constitution here under consideration.

It should be first observed that it makes no difference whether or not the General Assembly uses the term "permit fee" of the term "tax" in so far as the determination of the true nature of the levy is concerned. It is stated in Cooley's Constitutional Limitations, 8th Ed., Vol. 2, at page 1050:

> "Every burden which the State imposes upon its citizens with a view to a revenue, either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of tax, or under some other designation. The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for purposes of revenue, taxes: * * *."

The above general principle has been subject to many modifications, particularly where the courts were concerned with licensing the liquor traffic. There is a line of authorities holding that the regulation of the liquor traffic is so exclusively within the police power of the state rather than the taxing power that even though permit fees are provided in such amounts as to produce substantial revenue, such fees are not to be construed as taxes and their imposition not an exercise of the taxing power. Fees which would be unconstitutional as a confiscatory tax have been upheld when imposed upon occupations of this class. So that we find the Supreme Court of Alabama in Ex Parte Sikes, 10 Ala. 173, holding without hesitancy that a two thousand dollar liquor license fee in a town of four thousand was not an unreasonable exercise of the police power and we find other courts refusing to inquire very closely into the expense of a license with a view of judging it a tax where it did not appear to be unreasonable in amount, in view of its purpose as a regulation. *Wolf* vs. *Lansing,* 53 Mich. 367; *Johnson* vs. *Philadelphia,* 60 Pa. St. 445; *Burlington* vs. *Putnam Insurance Co.,* 31 Iowa 102; *Boston* vs. *Shaffer,* 9 Pickering 415; *Welsh* vs. *Hodgkiss* 39 Conn. 140; *State* vs. *Hoboken,* 41 N. J. Law, 71; Cooley's Constitutional Limitations, Vol. 2, page 1046. See also *Baker* vs. *Cincinnati,* 11 O. S. 534, 543, 544.

In these cases in which the courts have upheld liquor license or permit fees which would have been unconstitutional as taxes, the de-

cisions have been based upon a determination that the primary purpose of the enactments was regulation rather than revenue. It is stated in Cooley on Taxation, 4th E., Vol. 1, page 99:

> "If the primary purpose of the legislative body in imposing a charge is to regulate, a charge is not a tax even if it produces revenue for the public. To illustrate, liquor license fees in the days before the Volstead Act were almost unanimously held not to be a tax, but the exercise of the police power because regulation was the predominating feature of the fees."

Our own Supreme Court has determined that in so far as property rights are concerned under the Federal Constitution, permits issued by the Department of Liquor Control are mere licenses and revocable at any time as provided by law. *State, ex rel.* vs. *O'Brien,* 130 O. S. 23, the first and second branches of the syllabus reading as follows:

> "1. Within constitutional limitations, the General Assembly may, in the exercise of the police power, limit or restrict, by regulatory measures, the traffic in intoxicating liquors.
>
> 2. Permits to carry on the liquor business which are issued under the provisions of the Liquor Control Act are mere licenses, revocable as therein provided, and create no contract or property right."

There is little doubt in my mind, in view of this recent expression of the Supreme Court, but that taken as a whole the legislature in the enactment of the Liquor Control Law providing for a state monopoly, acted in the exercise of its police rather than its taxing power.

It does not follow, however, that these cases wherein the courts have sustained as constitutional excessive permit or license fees to regulate or control the liquor traffic on the ground that their passage constituted an exercise of the police rather than the taxing power, are authority for the position that there may not be included in such legislation laws providing for tax levies as the term is used in Article II, Section 1d of the Constitution. The Liquor Control Act itself, although the purpose and scope of the entire act is control and regualtion, contains laws providing for tax levies as I have hereinabove concluded in the case of Sections 6064-41, 6064-41a and 6064-42, General Code, as amended in House Bill 501. It might well be argued that a burden imposed upon the traffic in intoxicating liquor by any of the sections of the Liquor Control Act, even though expressly termed a tax by the General Assem-

bly, is nevertheless a burden imposed by the state in the exercise of the police power and therefore looking to the purpose of the enactment in reality, a mere license.

It becomes necessary in my judgment to consider the very obvious and apparent purpose of the people in excepting from the provisions of the Constitution relating to the referendum "laws providing for tax levies." I can conceive of no plausible distinction in so far as the right of referendum is concerned between a law enacted under the police power and a law enacted under the taxing power as such. Although, as hereinabove indicated, the courts have upheld as constitutional confiscatory fees when enacted under the police power and although it may be contended that the people desired to reserve what might be termed revisory jurisdiction over the General Assembly to preclude the exercise of the police power in an arbitrary manner on the part of their representatves, nevertheless it must be admitted that there would be equal force to the contention that it is necessary to curb the taxing power in order that it may not be exercised to an excessive degree. In many respects, the power to impose taxes is equally as broad, if not broader, than the police power. It is stated in Cooley's Constitutional Limitations, 8th Ed., Vol 2, page 986:

> "The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it."

In a word, no distinction is seen between the police power and the taxing power in so far as exemption from the referendum provisions of the Constitution is concerned except one and that one is the consideration of maintenance of the government of the state through adequate revenue. I do not believe that it may be successfully contended that the exemption of Article II, Section 1d of the Constitution here under consideration has any plausible reason for existence other than the sound principle that the revenues of the state shall not be delayed or interfered with by the referendum provisions of the Constitution, be

they derived through an exercise of the taxing power or through an exercise of the police power. There have been many cases where for some purposes the courts have considered a license as a tax when the amount of the license exceeds the cost of administration. The Supreme Court, speaking through Judge Banney in the case of *Mays* vs. *Cincinnati,* 1 O. S. 268, said at page 273:

> "A license may include a tax, or it may not, if the exaction goes no further than to cover the necessary expenses of issuing it, it does not; but, if it is made a means of supplying money for the public treasury, we agree with the court in *State* vs. *Rodberts,* 11 Gill & Johns, 506, that it 'is a tax is too palpable for discussion.' "

I am aware of the fact that in determining what was a law "providing" for tax levies as the word is used in Article II, Section 1d, the Supreme Court in the case of *State* vs. *Forney,* 108 O. S. 463, held that the word "providing" was not synonymous with the word "relating" to tax levies, or "pertaining" to tax levies, or "concerning" tax levies. In the determination of this question, the Supreme Court held that Article II, Section 1d of the Constitution was subject to strict but treasonable construction. The first two branches of the syllabus are as follows:

> "1. Exceptions to the operation of law, whether statutory or constitutional, should receive strict, but reasonable, construction.
>
> 2. The language of Section 1d, Article II of the Constitution, expressly enumerating certain exceptions to the people's right of referendum upon acts of the General Assembly, must be construed and applied with reference to this rule."

A consideration of the import of Section 6064-15, supra, whereby permits are issued for fees in many cases based upon the amount of business done, and having in mind the fact as hereinabove stated that this section produced revenues for the subdivisions of the state last year to the extent of approximately $4,800,000, I am compelled to conclude that this is a section "providing for tax levies" which may not be deferred or interfered with by the referendum provisions of the Constitution. In the absence of judicial authority to the contrary, I adhere to the principle that a law which provides substantial revenues for the state or its subdivisions in excess of four million dollars per year, even though included in an act or a section of an act passed in the

exercise of the police power, is a law providing for tax levies within the meaning of the term as used in Article II, Section 1d of the Constitution.

In your second question you inquire as to the effect of Amended House Bill No. 501 on unexpired A-1 and B-1 permits issued under Section 6064-15, General Code. Section 6064-15, General Code, provided the following as to A-1 and B-1 permits:

> "Permit A-1: A permit to a manufacturer to manufacture beer and other malt liquor containing not more than six per centum of alcohol by weight and sell such product in bottles or other containers for home use and to retail and wholesale permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be computed on the basis of the annual production of each plant; the initial fee shall be one thousand dollars for each plant producing five thousand barrels or less annually, and said initial fee shall be increased at the rate of five cents per barrel for all beer manufactured in excess of five thousand barrels during the year covered by the permit.
>
> * * * * * * * * *
>
> Permit B-1: A permit to a wholesale distributor of beer to bottle, distribute, or sell such produce for home use and to class C-1, class D-1, D-4, D-5, class E and class F permit holders under such regulations as may be promulgated by the department. The fee for this permit shall be computed on the basis of annual sales and distribution of beer. The initial fee shall be one thousand dollars for each distributing plant or warehouse and said initial fee shall be increased at the rate of five cents per barrel for all beer distributed and sold in Ohio in excess of five thousand barrels during the year covered by the permit."

The above provisions were amended in Amended House Bill 501 so that the fees for A-1 and B-1 permits will be the flat sum of one thousand dollars.

In answering this question two issues must be considered. First, what effect does Amended House Bill No. 501 have on unexpired permits, and second, if it is determined that permits continue in force until their various expiration dates, will A-1 and B-1 permit holders be required to pay the additional permit fees after the effective date of Section 6064-15, as amended in Amended House Bill No. 501.

Section 6064-20, General Code, provides in part as follows:

"Each class and kind of permit issued under authority of this act shall authorize the person therein named to carry on the business therein specified at the place or in the boat, vessel or classes of dining car equipment therein described, for a period of one year commencing on the day after the date of its issuance, and no longer, subject to suspension, revocation or cancellation as authorized or required by this act: * * *"

As is stated in 37 O. Jur. 429:

"In determining whether particular rights, duties, and remedies are controlled by a statute in its original or amended form or by a statute which has been repealed, the first inquiry to make is as to the intention of the lawmaking power.

However, conjectures as to such intention are to be avoided. That is to say, the law as enacted is controlling, and not that which the lawmakers would have adopted if they had thought about the application of the new law to existing rights, duties, and remedies."

Nowhere does Amended House Bill No. 501 mention the unexpired licenses and it is not unnatural to presume therefore, that the legislature intended that Section 6064-20 which was not amended, should be the guide to the determination of the rights of holders of unexpired permits. In 37 O. Jur., 449, the following statement appears:

"The repeal of a statute, authorizing the granting of licenses to engage in a particular kind of business, takes away the authority to grant future licenses. The right to make an application under a prior law for a license to practice a profession is not such a cause of procedure as is affected by the provisions of the General Savings Law. Unexpired licenses, however, are not necessarily intended to be revoked by such repeal act."

Generally, legislation unless an indication of a contrary intention of the legislature appears, should be construed so as to give it a prospective rather than a retrospective operation. As is said in Sutherland's Statutory Construction, Vol 2, page 1070:

"There is also a strong leaning against giving them (laws) a retrospective operation."

Fortunately it is not necessary to decide this question on the above broad general rules of statutory interpretation and construction, for the case of *Hirn* vs. *State,* 1 O. S. 15 provides definite authority. The facts in that case were as follows :

The plaintiff in error, prior to 1851 had a license to sell intoxicating liquor. On March 12, 1851 (49 O. L. 87) the law, under authority of which the license had been granted, was repealed but no mention was made therein of unexpired licenses. The plaintiff in error whose license had not expired was indicted for selling liquor contrary to the provisions of the 1851 law and the Supreme Court held that he had a right to operate until his license expired. The first three branches of the syllabus reveal the applicability of the decision to the problem here considered. They read as follows:

> "A license to keep a tavern under the authority of the act granting licenses and regulating taverns, passed June 1, 1831, was a license, according to the true intent and meaning of said act, to retail liquors as well as to keep a tavern.
>
> The act to restrain the sale of spirituous liquors of March, 1851, did, by its operation, repeal the act of June, 1831, so far as it conferred the authority to grant licenses in future to retail liquor, but did not, by any express language, revoke or annul the outstanding licenses which had been granted under the act of 1831, and had not expired at the time the former act took effect.
>
> Connected as the subject is with the public police and domestic regulations of the State, the Legislature had the power, on the ground of protecting the health, morals and good order of the community, to revoke or provide the mode of revoking the unexpired licenses granted under the act of 1831; but the exercise of this power, without refunding the money obtained for the license, would be an act of bad faith—and as repeals by implication are not favored, and penal statutes are strictly construed, such an operation will not be given to the law by mere implication, in the absence of words directly and clearly expressive of such intention."

The court mentions, it will be noted, that no provision for refunder was made under the law of 1851. That is also true of Amended House Bill No. 501. Therefore it is my opinion that the rights of the holders of unexpired permits are not affected by Amended House Bill No. 501.

This leaves for consideration the matter of additional fees required of A-1 and B-1 permit holders. It should be noted that these additional

permit fees are provided for in the same parts of Section 6064-15, General Code, that provide for the initial fees and therefore it seems that the legislature considered them alike in kind. There is no authority for contending that because they became payable at a later date they are different in quality.

In my opinion the rights and duties prevailing under the unexpired permits are concurrent. As long as rights are recognized under an unexpired permit the permit holder is bound by the fees imposed on said permit. The payment of permit fees being a burden attached to the privilege of holding a permit said permit is inseparable from the benefits. Certainly if the unexpired permits remain in force until their expiration dates said permits are governed as to rights and duties by the law under authority of which they were issued.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

716.

APPROVAL — BONDS OF CITY OF ALLIANCE, STARK COUNTY, OHIO, $54,000.00.

COLUMBUS, OHIO, June 11, 1937.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of City of Alliance, Stark County, Ohio. $54,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of refunding bonds in the aggregate amount of $132,400, dated October 15, 1934, bearing interest at the rate of 5% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
Attorney General.